NO. 20551

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DULAINE,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

JAFFE, OSTERMAN & SOLL
By: F. FILMORE JAFFE
6380 Wilshire Boulevard
Suite 900
Los Angeles, California 90048

Attorneys for Appellant

NO. 20551

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DULAINE,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

JAFFE, OSTERMAN & SOLL
By: F. FILMORE JAFFE
6380 Wilshire Boulevard
Suite 900
Los Angeles, California 90048

Attorneys for Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 20551

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DULAINE,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

I

STATEMENT OF THE CASE

On November 13, 1964, Appellant ROBERT DULAINE, filed a Complaint in the above captioned matter against the UNITED STATES OF AMERICA, under the Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671-80, for damages resulting from negligence which is alleged to have occurred within two years of the filing of said Complaint (Clk. Tr. pp. 2-6, inclusive).

On July 16, 1965, Respondent UNITED STATES OF AMERICA, filed a Notice of Motion and a Motion for Summary Judgment, in accordance with the provisions of Rule 56(b) & (c)

of the Federal Rules of Civil Procedure, in that the pleadings and all of the documents filed in this action show that Respondent is entitled to a Judgment as a matter of law.

Respondent also moved in same Motion, in the alternative, that should the Court deny the Motion for Summary Judgment, for an Order, pursuant to Rule 42(b) of the Rules of Civil Procedure, directing that the issue as to whether or not Appellant's Complaint was timely filed, be separated and tried and disposed of at the Court's convenience.

In support of said Motion for Summary Judgment, MORTON H. BOREN, then an Assistant United States Attorney, caused to be filed his Affidavit (Clk. Tr. p. 22, lines 1 through p. 24, line 10), and a Memorandum of Points and Authorities (Clk. Tr. p. 10).

On August 18, 1965, Appellant caused to be filed his Affidavit in Opposition to Motion for Summary Judgment (Clk. Tr. p. 25, line 18 through p. 34, line 23).

On August 24, 1965, THE HONORABLE IRVING HILL, Judge of the United States District Court, made certain Findings of Fact and Conclusions of Law on Respondent's Motion for Summary Judgment (Clk. Tr. p. 36, et seq.), and based upon such Findings of Fact and Conclusions of Law, granted Respondent's Motion for Summary Judgment (Clk. Tr. p. 40).

It is to this Judgment of Dismissal that Appellant files this appeal.

II

THE AFFIDAVIT OF APPELLANT IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHEN CONSIDERED WITH THE PLEADINGS ON FILE, ESTABLISHES THAT THERE WAS ONE OR MORE ISSUES OF FACT TO BE DETERMINED BY THE TRIER OF FACT, SO THAT A MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The Appellant is seeking recovery for damages that he alleges were sustained by him as a result of negligence on the part of the Veterans Administration personnel.

The Federal Tort Claims Act provides the time limit within which a tort action may be brought against the United States. This statute of limitations is found in 28 U.S.C. §2301 subd. (b) and reads as follows:

> "(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . . ."

The Complaint alleges, among other things, that within two years last past (that is, within two years preceding November 13, 1964, the date the action was filed), Appellant discovered for the first time that during the period that Appellant was under the care of WILLIAM A. TAYLOR, L. NEWMAN and such other doctors, nurses, aides, laboratory technicians, residents, interns, externs and attendants, and each of them, said parties, and each of them, failed to exercise the skill, care and degree of learning ordinarily

possessed by physicians and surgeons, nurses, aides, laboratory technicians, residents, interns, externs and attendants practicing their respective professions in the same locality, and negligently, carelessly and unskillfully diagnosed, evaluated, cared for, treated, operated upon, nursed, managed, attended to and provided for Appellant so as to proximately cause grievous injuries to his body and extremities (Clk. Tr. p. 4, lines 19-31).

In support of Respondent's Motion for Summary Judgment, MORTON H. BOREN filed his Affidavit (Clk. Tr. p. 22), wherein he states,

> "2. That he has reviewed the medical records of the Veterans Administration relating to the medical treatment rendered to the plaintiff.
>
> "3. That the plaintiff's medical records contain the following facts:
>
> "(a)
>
> "(b)
>
> "(c) . . . ."

Hearsay statements contained in an affidavit will not be considered in determining the motion. Dyer v. Mac Dougal, 201 F. 2d 265.

In conformity with Rule 56, subd. (e), Appellant's Affidavit in Opposition to Motion for Summary Judgment (Clk. Tr. pp. 25 to 34) was made on personal knowledge and set forth facts that would be admissible in evidence, and showed affirmatively that Appellant

was competent to testify as to the matters therein stated. In said Affidavit, Appellant raised a material issue of fact when he stated under oath that he was not aware of the malpractice until he learned the true facts late in November, 1962.

Appellant stated in his Affidavit as follows (Clk. Tr. p. 25, lines 26-32 and on p. 26, lines 1-2):

> "I did not know a rent had been cut in the main vein to the left leg soon after the operation in 1956. It was only after I learned the full facts of the operation for arteriovenous aneurysms that I realized that this was without a doubt a case of negligence and malpractice on the part of the Veterans Administration doctors. I learned the true facts late in November of 1962, when all of my hospital records were released from Sawtelle Veterans Hospital."

Again in Clk. Tr. p. 26, lines 9-22, the Appellant stated:

> "I discovered the omission of facts in 1963 and 1964 when I received and reviewed my medical records that were sent to me by Louis Litwin, and compared my compensation rating with the Schedule for Rating Disabilities that was sent to me from Washington, D.C., by Mr. A. W. Farmer, Director, Compensation, Pension and Education Service of the Veterans Administration. This was sent to me on June 11, 1964. The Schedule for Rating Disabilities of the Federal Register is dated May 22, 1964, and

was not available before that date. Therefore, it would have been impossible for me to have the information that was needed for my claim before that date. It was classified until May 22, 1964, when Congress decided that Veterans should have more information on their disabilities and made this a public document."

Again in Clk. Tr. p. 27, lines 23-26, the Appellant states:

"Now, when I learned in 1963 for the first time, that the Veterans Administration Adjudication office did not have any 'foreign bodies' listed, I requested an x-ray examination."

Again in Clk. Tr. p. 30, lines 2-10, the Appellant states as follows:

"Reference is made to line 22 of page 4 of defendant's Memorandum: 'It was then necessary to ligate the left common iliac vein.' Query: 'Why did counsel fail to list that it was also necessary to ligate the "hypogastric vein, left external iliac vein and large gluteal branch of left common iliac vein".' Of course, I don't know how necessary it was, but this was done during the operation and was concealed from me until the release of my records in the latter part of November of 1962."

Again in discussing the matter of discovery of the malpractice, the Appellant in his Affidavit, Clk. Tr. p. 31, line 17 through

p. 32, line 2, states:

"Shortly after September 29, 1964, Plaintiff received from the VA, a 'Statement of the Case' as required by law.

"In the statement of the case, on page 7, listed after the date November 27, 1963, is the following sentence: 'Received application for compensation, Form 21-526A for Malpractice during A-V fistual operation at Sawtelle VA Hospital on September 26, 1956.' The fact that there is a form for Malpractice in a government hospital was concealed from me by the Veterans Administration until late in 1963, even though I brought this to their attention in 1962 when my records were released, and when I discovered that this was malpractice.

"The 'Statement of the Case' of September 29, 1964, on page 13 in the second paragraph lists the reasons for the decision not to award payment for malpractice. There is no mention of STATUTE OF LIMITATIONS. If the Statute of Limitations has expired in this case, it would have to be listed in the 'Statement of the Case'. It was not listed, and therefore, it does not apply."

In replying to the Respondent's Memorandum concerning the discovery of the negligence, Appellant stated in his Affidavit,

Clk. Tr. p. 32, line 20 to p. 33, line 1 and p. 33, lines 9-12, as follows:

"On page 9a of Defendant's Memorandum, starting with line 12, it states, 'Although in answer to Interrogatory No. 3, the plaintiff alleges that his treatment from February 14, 1956 to date has been negligent, it should be noted that no mention is made in his answer to Interrogatory No. 2 of any negligent acts or omissions subsequent to his operation in September, 1956.'

"In answer to this I would like to say:

"1. The failure of the doctor to inject the proper amount of dye is listed under (a) Improper technique in performing aortogram. This was not discovered until my records were released in November of 1962.

"2. The failure to diagnose aneurysms or fistulas was not corrected until November 26, 1963.

". . . .

"The Veterans Administration doctors didn't admit the ligation of the common iliac vein, the external iliac vein, the hypogastric vein and the large gluteal branch of the iliac vein until 1963."

Again responding to Respondent's Memorandum, Appellant in his Affidavit, (Clk. Tr. p. 34, lines 5-10), stated:

"On page 10 of Defendant's Memorandum, counsel lists several letters. All of the letters were requesting compensation for disability. There was never any claim for malpractice for the simple reason that I did not know that there was malpractice until I received and reviewed my medical records in the latter part of November of 1962."

One who moves for summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact. Any doubt as to the existence of such an issue is resolved against him. The evidence presented at the hearing is liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence. Facts asserted by the party opposing the motion and supported by affidavits or other evidenciary material, must be taken as true. Janek v. Celebrezze, 336 F. 2d 828; Kilfoyle v. Wright, 300 F. 2d 626.

This is so even though the moving parties show that the responding party has made admissions that are inconsistent with statements in his affidavits. This situation, the courts say, do no more than raise an issue of fact, which makes a trial necessary. Eagle Oil & Refining Co. v. Prentice, 19 Cal. 2d 553.

The very first sentence in Respondent's Memorandum of Points and Authorities (Clk. Tr. p. 10, lines 4-9) recites as follows:

"It is clear that if this action is tried on the issue of negligence or malpractice, it will take considerable court time due to the need for extensive medical expert testimony to determine the facts concerning the alleged negligence and malpractice on the part of the defendant's agents and employees in treating the plaintiff."

The granting or withholding summary judgment should never be based upon the factor of saving time or expense. Aileen Mills Company v. Ojay Mills, Inc., 188 F. Supp. 138.

The Appellate Courts have stated with monotonous regularity that the purpose of the summary judgment procedure is to provide a method for the prompt dispositions of actions where there is, in fact, no triable material issue. The Court's duty is limited to the determination of whether or not factual issues are presented by the affidavits, and it is no part of the Court's duty to make any factual determination. Miller v. Miller, 122 F. 2d 209; Tobelman v. Missouri-Kansas Pipeline Company, 130 F. 2d 1016; Stevens v. Howard D. Johnson Company, 181 F. 2d 390; Union Transfer Company v. Riss and Company, 218 F. 2d 553.

The procedure authorized by Rule 56(b) & (c) of the Federal Rules of Civil Procedure is, of course, a drastic one, requiring caution in its application and may not be used as a substitute for the traditional method of determining factual issues. Hoffman v. Babbitt Bros. Trading Company, 203 F. 2d 636; United Meat

Company v. RFC Company, 174 F. 2d 528; Busman Construction Company v. Conner, 307 F. 2d 888.

On appeal from a summary judgment, the Court of Appeals should view the case from a standpoint most favorable to the appellant and accept his allegation of fact as true, and assume a state of facts most favorable to him. On appeal from a summary judgment, the only question is whether the allegations of the party against whom it was rendered was sufficient to raise a material or genuine issue of fact. Poller v. Columbia Broadcasting System, 368 U. S. 464; Tracer Lab., Inc. v. Industrial Nucleonics Corporation, 313 F. 2d 97; Libby v. L. J. Corporation, 247 F. 2d 78.

The determination of what constitutes a "genuine issue as to any material fact" is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to effect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. Keehn v. Brady Transfer and Storage Company, 159 F. 2d 383; Fishman v. Teeter, 133 F. 2d 222.

While a motion for summary judgment may be used by the defendant to assert the defense of the statute of limitations, the motion should be denied where only by trial on the facts could it be determined when plaintiff knew or should have known that he might have an actionable injury or case of action. Tracer Lab, Inc. v. Industrial Nucleonics Corporation, 313 F. 2d 97, R. J. Reynolds Tobacco Company v. Hudson, 314 F. 2d 776; Sheets v.

Burman, 322 F. 2d 277.

The second sentence of Respondent's Memorandum of Points and Authorities (Clk. Tr. p. 10, lines 9-15) recites as follows:

> "In the event that summary judgment is denied the defendant, as there is a serious question of whether or not the plaintiff's complaint is barred by the two year statute of limitations in the Federal Tort Claims Act, it would seem that this might well be a case where, with the Court's approval, a separate trial on the issue of the statute of limitations should be held." (emphasis added.)

It would appear that the Respondent concedes in the Memorandum of Points and Authorities that there is a "genuine issue as to any material fact".

III

CONCLUSION

From each of the foregoing, it is respectfully submitted that the Affidavit of Appellant in Opposition to Respondent's Motion for Summary Judgment when considered with the pleadings on file, established that there was one or more issues of fact to be determined by the trier of fact, so that the Motion for Summary Judgment should have been denied.

If, in fact, the Appellant has made admissions in the letters that are attached as exhibits to Respondent's Motion for Summary Judgment are inconsistent with his statements in his Affidavit in Opposition to the Motion for Summary Judgment, this situation does no more than raise an issue of fact, which makes a trial necessary.

Respectfully submitted,

JAFFE, OSTERMAN & SOLL

By: F. FILMORE JAFFE

Attorneys for Appellant

CERTIFICATE

I certify in connection with the preparation of this brief that I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ F. Filmore Jaffe

F. FILMORE JAFFE